



U.S. OFFICE OF SPECIAL COUNSEL

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October 8, 2020

The Honorable Marcia L. Fudge
U.S. Representative

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Re: OSC File No. HA-20-000394

Dear Congresswoman Fudge:

The U.S. Office of Special Counsel (OSC) has completed its investigation into allegations that U.S. Department of Agriculture (USDA) Secretary Sonny Perdue violated the Hatch Act on August 24, 2020, when he spoke in his official capacity at an event in Mills River, North Carolina (the “August 24 event”), and has issued Secretary Perdue a cure letter. The event generally related to USDA’s Farmers to Families Food Box Program. As explained below, OSC has concluded that Secretary Perdue violated the Hatch Act. Because he was on taxpayer-funded travel when he engaged in the political activity at issue, the U.S. Treasury must be reimbursed for the costs associated with his political activity.¹ Provided that immediate corrective action is taken and the U.S. Treasury is reimbursed for such costs, OSC will decline to pursue disciplinary action and instead consider this file closed with the issuance of the cure letter.

The Hatch Act restricts certain political activities of federal executive branch employees, except for the President and the Vice President.² As the Secretary of Agriculture, Secretary Perdue is covered by the Hatch Act and prohibited from, among other things, using his official authority or influence for the purpose of interfering with or affecting the result of an election.³ Under this provision, Secretary Perdue may not use his official title while engaging in political activity or his official position to advance or oppose candidates for partisan political office. Political activity is defined as activity directed toward the success or

¹ Pursuant to 5 U.S.C. § 7324(b), Secretary Perdue is not prohibited from engaging in political activity while on duty “if the costs associated with that political activity are not paid for by money derived from the United States Treasury.” The Hatch Act regulations provide that “costs associated with a political activity are deemed not to be paid for by money derived from the Treasury of the United States if the Treasury is reimbursed for the costs within a reasonable period of time.” 5 C.F.R. § 734.503(a). Because Secretary Perdue engaged in political activity while on duty and the costs of that political activity were paid for by funds derived from the Treasury, the Treasury must be reimbursed. Doing so does not, however, cure the violation whereby he used his official authority or influence to interfere with or affect an election.

² See 5 U.S.C. §§ 7321-7326.

³ See 5 U.S.C. § 7323(a)(1).

failure of a political party, partisan political group, or candidate for a partisan political office.⁴

At issue here is a speech that Secretary Perdue gave during the August 24 event in his official capacity as Secretary of Agriculture. During that speech, Secretary Perdue said:

Mr. President, as you saw those throngs of people lining both sides of the road from the airport all the way to Mills River here, those were a part of those forgotten people that voted for you for 2016. And I've got better news for you: They and many others are going to vote for you for four more years in 2020. Because they understand, under your administration, they've not been forgotten. And this [Farmers to Families Food Box Program] is a great example of that.

...

I saw last week—some of you may have watched; I didn't watch much, but I read a little bit about it—we were trying to talk about personalities in politics. Let me tell you what: People don't vote for personalities. They vote for policies and people that get it done like Donald J. Trump. You know, that's what people want. They want somebody who can get it done. They want a Decider-in-Chief. And if you've ever sat in that office, this man can decide. And when he decides, you better move out and get it done along with him.

...

[I]t was a \$3 billion program, you just authorized another billion dollars for the hungry people of this country and to keep our farmers there. And we've never seen an outpouring of compassion like that for people who matter, because people matter to you. And that's what's important to me. And that's what's going to continue to happen—four more years—if America gets out and votes for this man, Donald J. Trump.⁵

When asked to explain his comments, USDA's statement on his behalf said:

The Secretary (i) speculated about whom he saw lined up along the President's motorcade route; (ii) remarked about the "forgotten people" whom [Secretary Perdue] thought had supported the President in the prior election cycle; (iii) predicted who else might support the President because of his policy priorities and accomplishments; and (iv) observed that, if given the opportunity, the President would be able to advance his policy agenda of helping farmers and families in need for four additional years.

⁴ 5 C.F.R. § 734.101.

⁵ C-SPAN, *President Delivers Remarks on Farmers to Families Food Box Program* (Aug. 24, 2020), <https://www.c-span.org/video/?475118-1/president-delivers-remarks-farmers-families-food-box-program>.

At no point did the Secretary encourage or direct the crowd to vote for the President. Instead, as noted, the Secretary's statements described a prior occurrence and predicted future behavior based on the President's focus on helping "forgotten people," "farmers who were suffering," "distributors who were suffering," and people who have "lost their jobs." Such statements—those of a factual, predictive, and/or policy-based nature—do not implicate the Hatch Act's prohibitions. Secretary Perdue did not encourage attendees to vote for a candidate or party or advocate for a partisan political group.⁶

The idea articulated in this statement—that "factual, predictive, and/or policy-based" statements "do not implicate the Hatch Act's prohibitions"—is contrary to the law, and USDA offered no legal basis for its conclusion. Moreover, OSC is unaware of any authority supporting such a proposition. To the contrary, both the federal judiciary and the Merit Systems Protection Board have ruled that statements that are intended to encourage others to vote for or against a candidate for partisan political office or otherwise promote or disparage that candidate's campaign are political activity, even where the employee making the statement does not expressly request that others vote for or against a candidate.⁷

While it is impossible to anticipate all the ways in which an employee speaking in an official capacity might violate the prohibition against using one's official authority to interfere with or affect an election, certain topics—such as discussing candidates' campaign platforms, suggesting how to vote in an upcoming election, and explaining why voters should support a candidate—are inherently suspect because there are few, if any, reasons for an official representing the U.S. government to opine on such matters.⁸ Doing so risks giving the impression that the government itself has a preference for one candidate over another, the pernicious possibility of which was one of the principal motivations for passage of the Hatch Act in the first place. As the Supreme Court noted in a case affirming the constitutionality of

⁶ Letter from Richard Goeken, Principal Deputy General Counsel, U.S. Department of Agriculture, to Erica S. Hamrick, Deputy Chief, Hatch Act Unit, U.S. Office of Special Counsel, at 2-3 (Sept. 4, 2020).

⁷ See, e.g., *Burrus v. Vegliante*, 247 F. Supp.2d 372, 373 (S.D.N.Y. 2003), *rev'd*, *Burrus v. Vegliante*, 336 F.3d 82 (2d Cir. 2003) (displaying a poster presenting purely factual information comparing the positions and voting records of two candidates for president, even where the poster does not expressly advocate that viewers vote for or against either candidate, is political activity); *Special Counsel v. Malone*, 84 M.S.P.R. 342 (1999) (providing factual information regarding the existence of a political fundraiser to those doing business with an employee's agency is political activity and a prohibited use of official authority); *Special Counsel v. DePaolo*, MSPB Docket No. CB-1216-18-0016-T-1, at 11, 21 (Sept. 13, 2019) (touting, advertising, and advancing a candidate's campaign promise is political activity because it is an attempt to encourage votes for a particular candidate and political party).

⁸ This is not to say that any and all election-related discussions are prohibited. Numerous agencies, including OSC, have responsibilities that inherently require them to engage with electoral issues. Rather, it is statements for or against a particular candidate that are problematic. This rule was apparently clear to USDA ethics officials, whose briefing materials to Secretary Perdue included, for example, express admonitions against saying phrases like "in the upcoming election," "in November, be sure to," and "in the 2020 election" while speaking in his official capacity. The materials also note that if Secretary Perdue is asked about his views on an upcoming election when speaking in his official capacity, he "must answer by stating that [he is] in [his] official USDA capacity and cannot answer political questions at this time." *Supra* note 6, Attachment 3, at 4-5.

the Hatch Act, “it is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent.”⁹

Taken as a whole, Secretary Perdue’s comments during the August 24 event encouraged those present, and those watching remotely, to vote for President Trump’s reelection. His first words were not about USDA, but about the president’s 2016 and 2020 campaigns. Secretary Perdue described why those in Mills River voted for the president in 2016 and gave them a reason to vote for him again in 2020—because under a Trump Administration, they will not be “forgotten.” He then used this campaign pledge to segue into a discussion about the Farmers to Families Food Box Program, a program in which many of those in the audience had a vested interest. Secretary Perdue described President Trump’s recent action to bolster the program and said “that’s what’s going to continue to happen—four more years—if America gets out and votes for this man, Donald J. Trump.” In doing so, he described a program over which he had authority, one that positively affected those present, and stated that the program would continue if President Trump were reelected.

The justifications offered by USDA in Secretary Perdue’s defense only reinforce the conclusion that he violated the Hatch Act. Those justifications included that he “predicted who else might support the President [in his reelection] because of his policy priorities and accomplishments” and “observed that, if given the opportunity, the President would be able to advance his policy agenda of helping farmers and families in need for four additional years.” But those are precisely the sorts of statements that courts have found are intended to encourage supporters to vote for a particular candidate.¹⁰ Indeed, it is hard to imagine a better example of campaign rhetoric than telling constituents what a candidate would do if elected.

OSC’s conclusion does not mean that Secretary Perdue is prohibited from talking about President Trump when speaking in his official capacity. At the August 24 event, Secretary Perdue praised President Trump for his quick actions to establish the Farmers to Families Food Box Program and described how USDA and the Trump Administration are helping America’s farmers. Neither statement, standing alone, violated the Hatch Act. In both cases, Secretary Perdue referred to the president’s actions and how the administration was currently helping American citizens. But he also chose to make a case for the president’s reelection and encouraged those in attendance and watching remotely to support the president’s reelection. In other words, he chose to campaign for the president and speak about the president *as a candidate*. While Secretary Perdue has an unquestioned First

⁹ U.S. Civil Serv. Comm’n v. Nat’l Assoc. of Letter Carriers, AFL-CIO, 413 U.S. 548, 565 (1973).

¹⁰ See *Burrus*, 336 F.3d at 88 (it is “clearly” political activity to display a poster asking what policies the Democratic and Republican presidential candidates would pursue if elected); *DePaolo*, MSPB Docket No. CB-1216-18-0016-T-1 at 11-12 (advertising a candidate’s campaign promise is political activity).

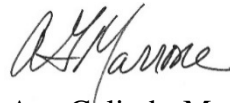
Amendment right to campaign for the president on his own time and in his personal capacity, he has no such right to do so in his official capacity and at taxpayer expense.

In light of the above, OSC has concluded that Secretary Perdue's speech was directed toward the success of the president's reelection campaign; that it therefore constituted political activity regardless of whether it contained "factual, predictive, and/or policy-based" statements, as there is no exception in the law for such statements; and that by delivering the speech in his official capacity Secretary Perdue violated the Hatch Act prohibition against using his official authority to interfere with or affect the result of an election. Pursuant to 5 U.S.C. § 7324(b)(1) and 5 C.F.R. § 734.503, the U.S. Treasury must be reimbursed within a "reasonable period of time" for the costs associated with his participation in the August 24 event.¹¹ OSC trusts that upon reviewing the cure letter Secretary Perdue will take the steps necessary to ensure that the Treasury is reimbursed and provide OSC with appropriate documentation of that reimbursement. OSC will then close its file in this matter.

Although OSC has decided to seek corrective action in this instance, we have advised Secretary Perdue that if in the future he engages in prohibited political activity while employed in a position covered by the Hatch Act, we will consider such activity to be a knowing and willful violation of the law that will likely result in further action pursuant to 5 U.S.C. § 1215.

Please contact OSC attorney Eric Johnson at (202) 804-7044 if you have any questions.

Sincerely,



Ana Galindo-Marrone
Chief, Hatch Act Unit

¹¹ While the regulations do not define what is a "reasonable period of time," OSC has previously proposed a 30-day reimbursement window. *See* U.S. Office of Special Counsel, Investigation of Political Activities by White House and Federal Agency Officials During the 2016 Midterm Elections 101 (Jan. 2011).